E COPY

Office-Supreme Court, U.S.
FILED
JUN 24 1960
WNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959, No. 854 98

Appeal from the Recorder's Court of the City of Detroit

JOSEPH THOMAS, JOSEPH MARTIN, LEROY HENDERSON, ELIJAH WALKER, JESSIE GOODEN, RUSSELL ROBERTS, JACK BOYD AND OZZIE SMITH, JR.,
Appellants,

v.

PEOPLE OF THE STATE OF MICHIGAN,
Appellee.

RECEIVED
OFFICE OF
SUPREME

MOTION TO DISMISS

PAUL L. ADAMS
Attorney General of Michigan

SAMUEL J. TORINA
Solicitor General of Michigan
The Capitol, Lansing, Mich.

RECEIVED
JUN 24 1960
OFFICE OF THE
SUPREME

SAMUEL H. OLSEN
Prosecuting Attorney,
Wayne County, Michigan

SAMUEL J. BREZNER
Assistant Prosecuting Attorney,
Wayne County, Michigan
500 Police Headquarters Bldg.
Detroit 26, Michigan

Attorneys for Appellee

SPEAKER-HINES AND THOMAS, INC., LANSING, MICH. — 1960

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Ordinances and Statutes Involved	2
Statement of the Case	2
Questions Presented	4
Conclusion	10
Exhibit 1—Information	12

INDEX TO AUTHORITIES CITED

Cantwell v. Conn., 310 US 296, 306, 307	6
Schneider v. State, 308 US 160	5
Walters v. City of St. Louis, et al, 347 US 231, 98 L ed 660	5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959, No.

Appeal from the Recorder's Court of the City of Detroit

JOSEPH THOMAS, JOSEPH MARTIN, LEROY HENDERSON, ELIJAH WALKER, JESSIE GOODEN, RUSSELL ROBERTS, JACK BOYD AND OZZIE SMITH, JR.,

Appellants,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Appellee.

MOTION TO DISMISS

Appellee moves that the appeal of the appellants from the Recorder's Court of the City of Detroit be dismissed for the reasons which will be set forth below.

OPINIONS BELOW

As stated by appellants, the Supreme Court of Michigan denied the application for leave to appeal without rendering a written opinion. This is in accordance with Michigan Court Rule 60 which provides that leave to appeal must first be obtained from the Supreme Court of Michigan. The appeal therefore is from the conviction in Recorder's Court which rendered no written opinion on the case.

JURISDICTION

Appellants attempt to invoke jurisdiction of this Court under 28 USCA, § 1257(a).

ORDINANCES AND STATUTES INVOLVED

Applicable provisions of the Michigan statutes and ordinances involved herein are correctly set forth in a Statement as to Jurisdiction (pp 3 and 4).

We would like to point out to this Court at this time that in their Statement as to Jurisdiction, the appellants mistakenly indicate that the penalty for violating the statute under which defendants were convicted is a felony. This is not true. It is a misdemeanor, as a reading of the statute will show.

The following Exhibit is included as Exhibit 1:

A certified copy of the Information issued against one of the defendants in this case, which is typical of all of the Informations issued in this case.

STATEMENT OF THE CASE

Appellee does not accept appellants Statement of the Case but believes it to be more accurately stated, in material part, as follows:

On July 7, 1957, uniformed Detroit police officers on scout-car patrol observed a crowd of some 150 persons at the intersection of Livingston and Hastings, in Detroit. They had congregated in the street, blocking vehicular

traffic. The officers attempted to move the people and enable traffic to move, but the crowd flowed back into the street. Loud shouts were heard and the crowd reassembled at the other corner. The officers returned to their car, drove to the station, and reported to their superior, Sergeant Max Neuendorf, who promptly went to the scene in uniform. He, too, saw 150 to 200 persons congregated, overflowing into both streets, blocking pedestrian and vehicular traffic; a speaker was addressing the crowd; the sergeant asked him to step from the stand so that they could converse; the speaker, later identified as defendant Elijah Walker, refused, and continued to talk to the crowd; the sergeant then stepped to the stand and asked the crowd to move down the street away from the intersection; Walker pulled him down and beat him about the neck; other officers intervened and seized Walker, and the crowd rushed at the officers.

Defendant Russell Roberts refused to obey an officer's instructions to step out of the street, and repeatedly attempted to force release of arrested persons who were seated in scout-cars. Defendant Leroy Henderson repeatedly sought to reach officers who were holding arrested persons and screamed, "You can't take our brothers. You can't take my brothers away." He was arrested after grappling with the sergeant.

Defendant Joseph Thomas leaped on the hood of a parked car and screamed to the crowd, "Down with the Caucasians. Look what they are doing." As he came down from the car at the sergeant's order, he attempted to kick the sergeant in the face, and was arrested.

Another officer (Douglas Fisher) told how Walker dragged the sergeant from the stand and struck him about the head, neck and shoulders. Another officer (David J.

Riley) testified that defendants Boyd and Martin rushed the police who were escorting Walker, under arrest, to the police car, and attempted to interfere, shouting, "Leave our brother alone."

Officer Mathew Parkinson described how defendant Ozzie Smith struck Patrolman Li gett twice as the officer was asking people to move north on the east side of Hastings; defendant Thomas was screaming: "Allah was God", and, "See what they are doing to you now. We are slaves.".

The eight defendants were arrested at the scene and were charged with violating Sec. 750.479, CL 1948, in obstructing, resisting, opposing, beating and wounding a police officer in the performance of his duty while attempting to disperse a crowd which was blocking traffic and disturbing the peace at a public intersection.

All defendants were convicted by a jury before Judge Gerald W. Groat, Judge of Recorders Court, Detroit.

QUESTIONS PRESENTED

If any federal question has been properly raised and presented, the Jurisdictional Statement does not accurately state such question.

Here defendants are attempting to invoke jurisdiction of this Court under 28 USCA, § 1257(a) by claiming that the statute under which defendants were convicted, § 750.479, CL 1948, Henderson's Mich Stat Ann § 28.747, violates the federal constitution inasmuch as it was based upon two ordinances of the City of Detroit, to-wit: Chapter 223, p 616, Sec. 2, Municipal Code, City of Detroit, 1954, and Chapter 339, Sec 12(a), p 1049 of such Code (Jurisdic-

tional Statement pp 2, 3, 4, and 5). Defendants assert these ordinances are void on their face as being repugnant to the 1st and 14th Amendments of the United States (Jurisdictional Statement p 3).

We answer as follows:

1. The defendants were not convicted of violating these ordinances but were convicted of violating § 750.479, CL 1948. The cases cited by appellants in support of their claim that this Court has jurisdiction in this matter resulted from convictions for violating the ordinances involved.

The Michigan court did not at any time determine the constitutionality of these ordinances, and therefore this Court is precluded from determining these questions at this time. As was held in *Walters v. City of St. Louis, et al*, 347 US 231, 98 L ed 660, "The United States Supreme Court will not undertake to review what a state court below did not decide."

2. Moreover, the ordinances are not unconstitutional on their face, as claimed by appellants. The First Amendment rights which the appellants are seeking to assert through the 14th Amendment, to-wit: freedom of speech and religion — are not absolute, as claimed by appellants, but are subject to restriction by a state i. the proper exercise of their police power of regulating the use of their public streets in such a manner that the public use or enjoyment of the same shall not be obstructed or incommoded, as was stated by this court in *Schneider v. State*, 308 US 160:

> "Municipal authorities, as trustees for the public have the duty to keep their communities' streets open and available for movement of people and property,

the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

And in *Cantwell v. Conn.*, 310 US 296, 306, 307, this Court stated:

"Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause.

which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But, to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

"*Second.* We hold that, in the circumstances disclosed, the conviction of Jesse Cantwell on the fifth count must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact."

3. In the present case, the instructions of the trial court properly presented the law in such a fashion as to protect the interest of the public and the rights of the defendant in accordance with the above decision. In instructing the jury, the Court stated:-

"Now, it is the theory of the People in this case that the officer of the Detroit Police Department observed a crowd of people, one to two hundred in number, at the intersection of Livingston and Hastings Street in the City of Detroit, being held there by a speaker; said crowd was blocking vehicular and pedestrian traffic; that Sergeant Neuendorf returned to disperse said blocking of traffic by the crowd; that he was assaulted by one of the — by one and obstructed by others in an effort to disperse said group." (Statement as to Jurisdiction, App p 2)

And at the request of the defendants, the Court gave the following instructions.

"I do, however, charge you that the theory of the defense is as follows: that a religious meeting was being held by persons of the Moslem religion, to teach their religion on Hastings Street at the corner of Livingston, and to hand out copies of a newspaper which featured their religion; that at first there was no obstruction of traffic, vehicular or pedestrian until the police arrived in numbers; that any traffic block or disturbance was done by the police officers, and there was, therefore, no justification for the action of the officers or for any arrests they made; that because the officers were acting unlawfully, none of the defendants could be guilty of opposing, resisting, or obstructing them in the performance of their lawful duties as officers; that defendants and others had a lawful and Constitutional right to assemble, to speak about religion in the streets as long as no disturbance of the peace or traffic block occurred, and that none did occur; that no ordinance was being violated, so that obstruction, resistance to officers who were not lawfully performing a duty in making an arrest or dis-

persing an unruly crowd, or a traffic block, was not the resisting of an officer within the meaning of the statute." (Statement as to Jurisdiction, App p 7):

As a result of these instructions, a question of fact was presented to the jury, which was decided adversely to appellants. The verdict therefore is not subject to review by this Court.

4. The appellants claim that they were deprived of due process because the Information does not state that they willfully and knowingly committed the acts for which they were convicted. However, the Information does state that the acts were committed

"contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

Note—See Sec. 750.479 C.L. 1948"

Section 750.479 CL 1948 provides that the actions must have been performed "willfully and knowingly" and the Judge in his charge to the jury stated:

"Request No. 2 I give with modification, where the statute requires that in order to constitute the offense the act must be done knowingly and willfully. The Court construes these words literally. To convict the defendants or any defendant, you must be first satisfied from the evidence beyond a reasonable doubt that such defendant knew that Max Neuendorf was at the intersection to disperse a crowd which was alleged to be blocking traffic and disturbing the peace, and that knowing such facts, such defendant intentionally did resist, or obstruct, or oppose, or beat or wound Max

Neuendorf while executing his duty. The words 'knowingly' and 'willfully' require that to be guilty, any defendant knew that Max Neuendorf was in the act of attempting to disperse a crowd which was blocking traffic or disturbing the peace, or both, and that the defendants, or any one of them you find guilty, acted to prevent Max Neuendorf from performing his lawful duty as a police officer, or to resist, obstruct, or oppose his performance.'

Under these circumstances, it is clear that the defendants' assertion that they were deprived of due process because they were not given a reasonable notice of the charges made against them and were not afforded an opportunity to examine adverse witnesses on the charge of which they did not have notice (Statement as to Jurisdiction p 17) is clearly without merit.

CONCLUSION

For the above reasons, it is respectfully requested that the appeal filed by the appellants be dismissed.

PAUL L. ADAMS
Attorney General of Michigan
SAMUEL J. TORINA
Solicitor General of Michigan
The Capitol, Lansing, Mich.
SAMUEL H. OLSEN
Prosecuting Attorney,
Wayne County, Michigan
SAMUEL J. BREZNER
Assistant Prosecuting Attorney,
Wayne County, Michigan
500 Police Headquarters Bldg.
Detroit 26, Michigan
Attorneys for Appellee